IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.691 OF 1993.

Smt.Babibai Bhagwan Mukane
& ors. : Appellants.

versus

Shri Popat Labuji Bhosale & ors.: Respondents.

Mr.R.M.Haridas i/by Mr.P.M.Joshi for the appellants.
Mr.G.S.Hegde for Respondent No.2.
Mr.S.M.Vidyarthi for Respondent No.4.

CORAM : D.G.DESHPANDE,J.

DATED : 1st February 2005.

ORAL ORDER

1. Heard advocates for the appellants and Mr.Hegde for Respondent No.2 - the S.T. The appellants are the original claimants whose claim petition under the Motor Vehicle Act vide Motor Accident Claims Petition No.339 of 1989 was dismissed by the Motor Accident Claims Tribunal

Nashik by order dated 6/10/1992.

2. Name of the deceased was Bhagwan Ananda Mukane. He was the husband of appellant No.1; father of Respondent Nos.2 and 3 - the daughter and son respectively; and son of Respondent No.4 - the mother. He was the employee of Opponent No.3 as a driver of tempo bearing No.MWN 3336. Accident occurred on 5/6/1989. At that time deceased Bhagwan was driving the tempo towards Satpur. When the tempo had reached near Victor Gasket Company, ST bus bearing No.MTB 5347, driven by Opponent No.1 rashly and negligently, came in a fast speed and gave powerful dash to the tempo. The dash was so powerful that deceased Bhagwan, who was driving the tempo, was trapped between the steering and the driver's seat and died instantaneously. It is in this background the claim petition was filed for the compensation of Rs.Two lakhs.

. According to the claimants, the deceased was driving the vehicle for the last six years before the accident. He was getting Rs.1000/- as salary per month. He was spending Rs.700/- for the maintenance of the family and, therefore,

compensation was claimed.

3. Respondent No.2 was the main contesting party. They filed their reply to the claim petition and contended therein that at the time of accident deceased Bhagwan was heavily drunk, therefore, he could not give attention to the speed breaker and his matador, which was coming in speed jumped, from the speed breaker and dashed against the ST bus which was coming in a slow speed near Victor Gasket Company bus stop. Further, according to Respondent No.2, the conductor had given bell to stop the bus because the bus was coming near the bus stop and at the time of accident the ST bus was to the left side of the road, and therefore, the entire responsibility of the accident was of deceased Bhagwan.

4. The lower court while considering Issue No.1, i.e. Whether the accident in question was caused due to rash and negligent driving of S.T. bus MTB 5357 driven by Opponent No.1 and owned by Opponent No.2 at the time of accident ?, gave a finding against the claimants and, therefore, the claim petition came to be dismissed in its

entirety. Hence this appeal.

5. Counsel for the appellants contended that there was nothing on record to show that deceased Bhagwan was heavily drunk and in that condition he was driving the matador. The counsel for the appellants conceded that it is true that as per the Post mortem report the lever contents were found to be smelling of alcohol, but that in itself was not sufficient to conclude that deceased Bhagwan was heavily drunk. It might be that he had consumed liquor but it could not be said that consumption was to the extent of loosing control of vehicle or incapability to drive safely.

6. Counsel for the appellants contended that the defence that since Bhagwan died instantaneously, neither the driver of the ST bus nor the conductor, nor anybody could have detected that he was drunk. This defence appears to have been raised by Respondent No.2 only after perusal of the post mortem report and not on the basis of account of accident given by the eye witness or any person either ST driver or the

conductor of the said bus who were the best person or only person to give instruction to file reply to the claim petition.

7. Thirdly, counsel for the appellants contended that there are contradictions and variance in the defence raised in the written statement by Respondent No.2 and the evidence given by the witnesses of Respondent No.2. My attention was drawn to the evidence of Vinayak Sonawane and Popat Bhosale, who were the conductor and driver of the ST bus respectively.

8. Counsel for the appellants contended that the claimants have examined one independent witness Bharat Kale who was the eye witness to the incident. But his evidence was totally discarded by the Court on flimsy grounds. He, therefore, contended that reasonings of the tribunal regarding issue No.1 are totally perverse and, therefore, the appeal is required to be allowed.

9. As against this, Mr.Hegde, the counsel appearing for Respondent No.2, contended that from the panchanama of the scene of offence and

the situation of both the vehicles noted it was clear that it was the matador that dashed against the S.T. Bus which had stopped near the bus stop. Mr.Hegde also contended that there were two speed breakers. The ST bus had crossed one speed breaker and, the matador, coming from other side, after crossing the other speed breaker, in other direction, dashed against the ST bus because deceased Bhagwan was heavily drunk. He, therefore, contended that this was not a case where respondent No.2 was, in any case, responsible and, therefore, according to him, the Tribunal has rightly rejected and dismissed the claim petition.

10. I have given my anxious consideration to the submissions made by both the advocates. I am not convincing by any of the submissions made by Mr.Hegde.

11. The claimants have examined Bharat Kale who was the independent witness and not concerned with, nor related with either to the deceased or to the driver or conductor of the ST bus. He has stated that at about 10 p.m. on that day he closed his pan shop which was opposite to Victor

Gasket company. He was talking with his friend on road. He was that a tempo was coming Nashik side, which was running from left side. At that time one bus came from Satpur side in a fast speed. The bus was driven with its driver wheel to the right side of the strip of centre and the bus gave dash to the tempo. The dash was so powerful that the tempo was pushed back by the bus to a distance of 30/40 feet, and then the tempo was caught fire. When he went near the tempo he found that driver of the tempo was dead in his seat. He was the witness who was called by the police for panchanama. He has proved the panchanama at Exhibit 47.

12. This witness was cross examined by and on behalf of the ST - Respondent No.2. Absolutely nothing was brought on record in his cross examination to discredit the witness in any manner whatsoever, which shows that he has any bias against the ST and that he has any reason to favour the claimants. The cross examination is concluded by putting him four questions. I am reproducing those questions as under :-

"It is not true to say that in between

bus stop and my pan shop, there is a speed breaker on the road. The accident took place within my sight. It is not true to say that the central white line was not painted on the road, at the time when accident took place. My statement was recorded by the police. It is not true to say that I am taking a false statement that S.T. was driven with fast speed."

. The evidence of this witness was rejected by the tribunal only on the ground that in post mortem of deceased Bhagwan the food in his stomach was smelling of alcohol. No separate and independent reasons are given by the tribunal as to why Bharat Kale should be disbelieved.

13. It is, therefore, clear that the entire case of the claimants and evidence of Bharat Kale is rejected, without any discussion and proper reasoning, only on the basis of smelling of alcohol to the contents of stomach of deceased Bhagwan. This is not at all proper approach of the tribunal.

14. The tribunal has also placed reliance upon the evidence of driver and conductor of the Bus with reference to that of Kale, obviously, for wrong reasons. The evidence of driver is so peculiar in the sense that he has tried to improve his story and he has contradicted himself with the written statement and reply. He is the witness No.1 for Respondent S.T. He has stated that he was driving the bus from Satpur to Panchavati. It was at about 10.45 p.m. and when the bus started approaching the stop the conductor of the bus gave bell and, therefore, he slowed down the speed and started cross the speed breaker across the road. Then he stated that after the speed breaker was crossed, he went to the stop and stopped his bus. The accident took place when the bus was completely halted and stationary. This is totally contradictory to the written statement. In the written statement it is stated that he has slowed down the speed of bus and at that time the tempo dashed. In his evidence he stated that he has completely stopped the bus after crossing the speed breaker.

15. Secondly, according to witness Popat, the tempo, while crossing the speed breaker became

uncontrolable and dashed against the S.T. In this connection Mr.Hegde contended that there were two speed breakers, one which the S.T. had crossed and other which the tempo was going to cross. There is absolutely no support to his contention nor any basis that there were two speed breakers. The driver also does not speak about the speed breaker nor the conductor speaks about the speed breaker. Therefore, the arguments of Mr.Hegde is of without basis.

16. This witness Popat has admitted that the tempo caught fire. There is absolutely no explanation as to how the tempo could get fire after it had only dashed against a stationary S.T. bus. He also admitted that one woman and girl, who were thrown away, were sitting in the driver’s cabin of matador.

17. This witness Popat was cross examined and he has admitted that he had given instructions to his employer that when the accident took place the S.T. bus was standing at the bus stop. But he had no explanation as to how and why it is not mentioned in the written statement or in the reply.

18. Then Respondent No.2 examined the conductor of S.T. bus. He has stated that when the bus reached a stop near Victor Gasket, their bus stopped there as some passengers were to alight there from the bus. At a distance of 30/40 feet away from the bus stop there was a speed breaker across the road. The bus was stationary parked at the left side on kutcha road. One tempo was coming from the opposite direction with fast speed and after passing the speed breaker it dashed against the bus.

19. This witness - conductor does not state that there were two speed breakers one which was crossed by the S.T. bus near the bus stop and other which was crossed by matador. He speaks about only speed breaker. This also is the factor to reject the contention of Mr.Hegde that there were two speed breakers. Secondly, this witness has also given contradictory version to the written statement where it is stated that the bus had slowed down. But he stated that bus was stationary at the time of impact by tempo.

20. Therefore, it is clear that both the

witnesses have changed their version and changed the defence raised in the written statement and have taken contradictory stand. Obviously this was done with a view to save their skin and to escape from responsibility.

21. Even otherwise, the conductor in his cross examination admitted that at the time when the accident took place he was near the conductor seat. Admittedly, the conductor seat is in the rear side of the bus. It was night time and, therefore, the conductor could not have witnessed or seen the manner in which the impact took place. He was confronted with the written statement, but he could not give any explanation as to why in the reply it was not averred that the bus was standing at the bus stop. For all these reasons, the theory of the conductor and driver and the accounts given by them of the accident should have been rejected by the tribunal.

22. The next contention of Mr.Hegde was that from the panchanama it can be assessed that it was the tempo which dashed against the bus. Firstly, the panchanama will only show what was

observed by the panchas. It cannot at least in this case be given higher place than the evidence of Kale, the eye witness examined by the claimants. Even otherwise the condition of tempo was that its engine has come down on the road, the door of the tempo was broken and wooden sheets were broken and chassis has come down; the frond show glass was broken and its steering was also broken and come down in cabin. This is in addition to the fact that because of powerful impact the driver was crushed between the steering wheel and the seat of the driver Bhagwan and died on the spot.

23. Mr.Hegde further contended that as per this panchanama the driver side of the S.T. bus was damaged and that lent support to his contention that the matador had dashed against the S.T. No such interference can be drawn when the eye witness Kale has given account of the accident and there is absolutely no cross examination worthy of consideration of this witness.

24. Therefore, this is a case where the claimants have succeeded in proving that it was

the S.T. bus that was included and was responsible for the accident. It may be that Bhagwan had consumed alcohol, but no percentage of alcohol in the blood was given and, it cannot be concluded that he was under the influence of liquor and he was so drunk that he was unable to control his vehicle. The fact that one woman and girl were thrown out of the tempo and the tempo caught fire also proves that it was the impact between two vehicles in motion. The theory put forth by the S.T. respondent No.2 in their reply and in the evidence is totally false and is required to be rejected.

25. Since the claimants's petition was rejected only on the basis of finding on Issue No.1 and since that finding is liable to be upset for the reasons stated above, the question is of compensation. The tribunal in Issue No.3 has come to the conclusion that the claimants would have been entitled to Rs.1,15,128/- and Rs.5,000/- in addition for loss of consortium. Claimant Babibai was only 22 years of age at the time of accident. Two children were minor aged about 4 and 1 respectively and mother of the deceased was 48 years of age. Therefore amount

of Rs.5,000/- fixed by the tribunal is too meagre and not in proportionate. The deceased was about 25 years of age and even if for the sake of argument it is contended that having driven the vehicle after consuming liquor, he was responsible for some contribution towards negligence. The claimants are entitled to Rs.1,15,128/- as determined by the tribunal plus Rs.30,000/- for loss of consortium and love and affection and mental shock. Hence the order :-

:ORDER:

The appeal is partly allowed. The impugned order of dismissing the petition of the claimants is set aside.

The claimants will be entitled to Rs.1,45,000/- with interest at the rate of 9% per annum from the date of the claim petition till payment and the costs of this appeal.

[D.G.DESHPANDE]

01/02//2005 JUDGE.